No. 81-2362

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

B. F. DIAMOND CONSTRUCTION COMPANY, INC.
and
AETNA CASUALTY & SURETY COMPANY,
Petitioners,

v.

HOWARD LEMELLE and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAM,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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(12630)

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
REASONS FOR GRANTING THE WRIT	3
1. The Fourth Circuit Has Discarded The Occupational Analysis Required By This Court's Decisions And Has Unjustifiably Extended LHWCA Coverage To Virtually All Bridge Construction Workers	3
2. The Analysis For Determining LHWCA Coverage Utilized By The Fourth Circuit Conflicts With The Rationales And Decisions Of Other Circuits	7
3. The Decision Below Raises Significant And Recurring Problems Fundamentally Affecting The Construction Industry	8
A. Confusion in Bidding	8
B. Increased cost for LHWCA premiums	9
C. Personnel problems resulting from the extention of LHWCA benefits to construction workers	10
D. Availability of coverage	11
CONCLUSION	12
APPENDICES A, B, C, D, E	

TABLE OF AUTHORITIES

PAGE

Cases

Browning v. *B. F. Diamond Const. Co.*, __ F.2d __ (11th Cir., 1982) 8

Fusco v. *Perini North River Assoc.*, 622 F.2d 1111 (2d Cir., 1980) *cert. denied*, __ U.S. __, 101 S. Ct. 7

Gilliam v. *Wiley N. Jackson Co.*, 659 F.2d 54 (5th Cir., 1981) 8

Northeast Marine Terminal Company, Inc. v. *Caputo*, 432 U.S. 249 (1977) 3,4,6

P.C. Pfeiffer Co., Inc. v. *Ford*,444 U.S. 69 (1979) 3,4,5, 6,7,10

Southern Pacific Co. v. *Jensen*, 244 U.S. 205 (1917) ... 4

Stockman v. *John T. Clark & Son of Boston, Inc.*, 539 F.2d 264 (1st Cir., 1976) *cert. denied*, 433 U.S. 908 (1976) 7

Thibodaux v. *Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir., 1978) *cert. denied*, 442 U.S. 909 (1978) .. 7

Weyerhauser Co. v. *Gilmore*, 528 F.2d 957 (9th Cir., 1976) *cert. denied*, 429 U.S. 868 (1976) 7

United States Statutes

33 U.S.C. §902(3) 3,4,5

Miscellaneous

Hearings before the Subcommittee on Labor of the Committee on Labor & Public Welfare, United States Senate, on S.2318, S.575, and S.1547, 92nd Cong., 2nd Sess. (1972) 6,A-1-18

PAGE

Hearings before the Subcommittee on Labor of the Committee on Labor & Human Resources, United States Senate, on S.1182, 97th Cong., 1st Sess. (1981),

Statements and testimony of:

Senator Nickels (Subcommittee Chairman), pp. 14, 15, ... C-1,D-2

Steven B. Clarkson (Special Counsel to the Shipbuilder's Council of America), pp. 762-74 ..... B-1-13

Eric J. Oxfeld, (Employee Benefits Attorney, Chamber of Commerce of U.S.A.), pp. 1148 ..... D-1

Robert J. Massman (Associated General Contractors of America, Inc.), pp. 927-36 ..... E-1-13

H. R. Rep. No. 92-1441 6

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Respondents.

BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The Associated General Contractors of America, Inc. ("AGC") hereby submits this brief in support of the petition in No. 81-2362 for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on March 25, 1982.

INTEREST OF THE AMICUS CURIAE[1]

The Associated General Contractors of America, Inc. is a national trade association consisting of 113 state and local

[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 36 (2). Letters of consent are on file with the Clerk of this Court.

chapters and representing 30,000 firms, including approximately 8,400 of America's leading general contracting firms, engaged in the construction industry in the United States and Puerto Rico. AGC member firms are responsible for the employment of approximately 3,500,000 employees. Construction is the largest industry in the United States, and the members of AGC perform approximately 80% of the general contracting construction business performed in the United States each year, including the construction of commercial buildings, highways, industrial and municipal-utility facilities.

The AGC regularly represents the interests of its general contractor members in important matters vitally affecting those interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the Federal Government. This includes rendering assistance to courts in their deliberations on significant decisions concerning the construction industry.

The specific question presented in this case is whether the Fourth Circuit erred in determining that a construction worker was engaged in maritime employment within the meaning of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") while pouring and vibrating concrete on a bridge over navigable waters and where the employee was not engaged in any work traditionally associated with longshoring, harbor work or shipbuilding. A review of the Fourth Circuit's decision is vital to the interests of the AGC and its members because, although construction employees have historically been covered by state workers' compensation plans, the practical result of the decision below is to shift coverage for virtually all construction employees working on bridges over navigable waters to the LHWCA. This result is in conflict with the decisions of other circuits. Accordingly, until this issue is resolved by this Court, the AGC and its members will be subject to conflicting and confusing requirements governing LHWCA coverage of its employees which will have a significant impact upon the costing and bidding of contracts, and which poses substantial business risks associated with potentially inadequate insurance coverage

and, in some cases, the unavailability of LHWCA insurance in the construction field.

REASONS FOR GRANTING THE WRIT

1. The Fourth Circuit Has Discarded The Occupational Analysis Required By This Court's Decisions And Has Unjustifiably Extended LHWCA Coverage To Virtually All Bridge Construction Workers

This case presents the issue of whether a bridge construction worker performing the same duties as he would on land, and not engaged in longshoring, harbor work, or shipbuilding, can be properly classified as an employee engaged in "maritime employment" within the meaning of § 2(3) (and thus be eligible for compensation under § 3) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA" or "Act").[1] The Fourth Circuit held that he could (A-2).[2] This ruling is in direct conflict with the decisions of this Court in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977), and *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979). For as we show below, the requirements established by Congress and approved by this Court—that coverage under the Act is limited not only to those injuries sustained on navigable waters and adjoining areas *but also* only to those employees engaged in longshoring, harbor work and related employment—have been totally cast aside by the Fourth Circuit. As a result, the breadth of LHWCA coverage has been unjustifiably expanded in contravention of Congressional intent and the dictates of this Court to include virtually all construction workers engaged in traditional construction crafts while working on bridges over navigable waters.

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[1] 33 U.S.C. §§ 902(3), 903.

[2] References to "A-__," "B-__" and "C-__" in this section are to the Appendix to the Petition for a Writ of Certiorari in this case.

In *Caputo*, this Court found that in 1972, when Congress sought to correct the anomalies of the *Jensen* line test,[3] it decided to "describe affirmatively the class of workers [it] desired to compensate." 432 U.S. at 264. Thus, while expanding the situs or geographical area of coverage under the LHWCA, Congress also sought through the 1972 Amendments to limit eligibility for coverage by imposing a "status" test (432 U.S. at 264-65):

> [Congress] therefore added the requirement that the injured worker be engaged in maritime employment, which it defined to include any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but . . . not . . . a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net. 33 USC § 902(3). The 1972 Amendments thus changed what had been essentially only a situs test of eligibility for compensation to one looking to both the "situs" of the injury and the "status" of the injured.

Similarly, in *Ford*, 444 U.S. at 78, the Court stated:

> The Act . . . contains distinct situs and status requirements. The situs test of § 3(a) allows recovery for an injury suffered on navigable waters or certain adjoining areas landward of the *Jensen* line. This test defines the broad geographic coverage of the Act. *Section 2(3) restricts the scope of coverage by further requiring that the injured worker must have been engaged in maritime employment.* This section defines the Act's *occupational* requirements. (emphasis supplied)

Accordingly, under the authority of both *Caputo* and *Ford*, claimant LeMelle would be eligible for LHWCA benefits only if he satisfied the dual requirements of having worked at a

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[3] See 432 U.S. 256-64.

maritime situs[4] and having been employed in a maritime occupation.

The Fourth Circuit here, while paying lip service to the mandate that a claimant must qualify under both a situs and a status test (A-5), gave no actual consideration to the claimant's occupation (construction worker) or even to the nature of the work he was performing at the moment of injury (A-3). Rather, it limited its analysis to the effect on navigation of the bridge upon which LeMelle was pouring and vibrating concrete, a factor relevant to situs but not status, and concluded that insofar as the new bridge was designed in part as an "aid to navigation" (in that the new bridge would provide greater waterway clearance than the old one),[5] LeMelle was engaged in maritime employment (A-9). This reasoning simply ignores this Court's, and Congress', emphasis on the occupation of the particular claimant and the requirement that his status as an alleged maritime employee be examined independently from the situs of his work. As this Court has explained, and as the Fourth Circuit evidently forgot, "the crucial factor [in determining status] is the nature of the activity to which a worker may be assigned." 444 U.S. at 82.

Moreover, it is apparent that the Court below not only failed to apply the proper *Caputo/Ford* test to determine maritime employment status, but also, had it applied the proper analysis, would have been required to find, as did the ALJ and the Board below, that LeMelle was not engaged in maritime employment.

As noted above, § 2(3) of the Act defines an employee engaged in "maritime employment" as "including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder or shipbreaker . . . ." No contention has been or reasonably can be raised in this

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[4] It was conceded below that, insofar as LeMelle was working on a bridge being constructed over navigable waters, his claim satisfied the situs requirement (A-3-4-6).

[5] Even in this respect the Court substituted its judgment on a factual issue for that of the Benefits Review Board, the administrative body with presumed expertise in such matters (see B-6-9).

case that a bridgeworker engaged in the pouring or vibrating of concrete is performing work of the same or reasonably related character to that performed by longshoremen or harborworkers.

In addition, the legislative history of the Act clearly shows that Congress did not intend workers in such separate and unrelated occupations to be eligible for LHWCA coverage. *See* H.R. Rep. No. 92-1441. For the status requirement "focuses upon the nature, not the location of employment . . . it does not extend coverage to all workers in the situs area." 444 U.S. at 83. As this Court has stated, Congress clearly intended to cover "workers engaged in the essential elements of unloading a vessel . . . [however] persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered." 432 U.S. at 267. Thus, for example, as Congress has explained, and this Court has recognized, "employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transport are not covered." *Id.* There is, we submit, no meaningful difference between that hypothetical truck driver and LeMelle, as neither is "engaged in the overall process of loading and unloading vessels." *Id.*

Moreover, the legislative history of the 1972 amendments to the LHWCA and the testimony offered to Congress at that time give no indication that industries other than longshoring, harborworking, and shipbuilding were intended for coverage. For example, at the *Hearings before the Subcommittee on Labor of the Committee on Labor & Public Welfare, United States Senate, on S.2318, S.525, and S.1547*, 92nd Cong., 2nd Sess. (1972), testimony was heard only from representatives of longshoremen, harborworkers, stevedores, shipbuilders and workers in similar maritime occupations. The list of witnesses, statements and additional information of the *Hearings* (see Appendix A of this brief) reveals that no testimony was heard or apparently sought from members of industries outside of traditional maritime fields, clearly indicating that Congress did not contemplate expansion of coverage to construction work and other nonmaritime industries. Moreover, under simultaneous consideration in 1972 was S.1547 (to apply the LHWCA to maritime

petroleum workers), thus indicating that when Congress intended to consider extending LHWCA coverage to a separate industry unrelated to those enumerated in Sec. 2(3), it did so plainly and publicly.

Finally, it should be emphasized that, in *Ford*, this Court recognized that Congress intended to apply a "uniform standard of coverage" that would not vary for employees performing the same tasks depending upon their situs of work. 444 U.S. at 83. The Fourth Circuit's decision here directly thwarts this goal since it would permit LHWCA coverage for an employee pouring concrete on a bridge while denying that coverage to a co-employee performing identical work on the roadway approach to the bridge only a few feet away.

2. *The Analysis For Determining LHWCA Coverage Utilized By The Fourth Circuit Conflicts With The Rationales And Decisions Of Other Circuits*

Although various circuits have devised somewhat different approaches to coverage under Sec. 2(3), no other Court of Appeals has repudiated the *Caputo/Ford* occupational analysis as did the court below. *See e.g., Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 275 (1st Cir., 1976), *cert. denied*, 433 U.S. 908 (1977) (Court looks at "nature of [the workers'] regularly assigned duties as a whole"); *Fusco v. Perini North River Assoc.*, 622 F.2d 1111 (2nd Cir., 1980), *cert. denied*, — U.S. —, 101 S. Ct. 959 (1981) (the work must have a significant and realistic relationship to maritime activities, and coverage may not be based upon locus alone); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir., 1978), *cert. denied*, 441 U.S. 909 (1978) (worker must be directly involved in loading or unloading either in his overall occupation or at the moment of injury); *Weyerhaeuser v. Gilmore*, 528 F.2d 957 (9th Cir., 1976), *cert. denied*, 429 U.S. 868 (1976) (employee's *own* work must have realistically significant relationship to traditional maritime activity). Under none of these traditional approaches would a construction worker pouring concrete on a bridge be deemed in maritime employment.

Two recent decisions, although both finding employees working on a bridge to be covered by LHWCA, are consistent with

Petitioner's position regarding the "status" analysis because the claimants in those cases, unlike LeMelle, were involved in loading and unloading—traditional longshoring activities. Thus, in *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54 (5th Cir., 1981), the Court found that claimant was injured while supervising and assisting in the off-loading of pilings from a barge "and, hence, was engaged in longshoring activities at the time he was injured. It is that simple." 659 F.2d at 58. Similarly, the Eleventh Circuit, in *Browning v. B. F. Diamond Const. Co.*, ___ F.2d ___ (1982), found that claimant there was involved in loading and unloading and, hence, was covered under the *Gilliam* rationale. Since the basis for the Fourth Circuit's decision is that LeMelle was merely working on a bridge deemed to be an "aid to navigation," and there is no finding or contention that he was engaged in traditional longshoring activities, these bridgeworker cases lend no support to the faulty rationale of the court below.

In sum, the rationale for determining maritime employment status utilized by the Fourth Circuit is in direct conflict with the approaches and rationales employed by the other circuits, and, thereby, warrants a grant of certiorari to resolve this conflict.

3. *The Decision Below Raises Significant And Recurring Problems Fundamentally Affecting The Construction Industry*

The decision below poses a significant threat not only to the integrity of the LHWCA but also to construction contractors required to make fundamental business decisions which are affected by actual or potential employee coverage under the Act. The Fourth Circuit's decision raises the threat that employees, who traditionally have been protected by state worker's compensation programs, and have been primarily, if not exclusively, engaged in land-based activities, will suddenly be termed maritime employees for LHWCA purposes because these employees may spend a brief part of their working time on the bridge portion of a project. The serious, practical implications of this problem for the construction industry are discussed below.

A. Confusion in bidding

At present, a construction contractor must carefully analyze each project for possible application of the LHWCA. However,

since there are no set criteria for LHWCA coverage because of the ambiguity of the law, which has been intensified by the decision below, the contractor must take a significant business risk in either including the expensive insurance coverage in his bid, thereby raising his bid and increasing the likelihood of being underbid, or omitting the insurance coverage and exposing his firm to unexpected judicial expansion of the LHWCA and to large financial loss from an injured employee's claim for LHWCA benefits (see Appendix E-7).

For example, a contractor must often bridge rivers or streams during the execution of a highway contract. The activities are hardly of a longshoring or harborworking nature although the body of water may be technically "navigable." The workers perform exactly the same duties as they do on land and engage in no activity that could be meaningfully called "maritime employment." Yet the contractor must decide whether he should add to his bid the extra cost of insurance to cover the possible LHWCA exposure. As the decision below evinces, the scope of coverage may expand widely from one moment to the next, and the contractor has no reliable guidelines with which to make an intelligent decision.

B. Increased cost for LHWCA premiums

Construction contractors are required by state statute to provide workers compensation for their employees. *Id.* The cost for this coverage is a function of benefit levels established by the states and the loss experience of the contractor. Despite this coverage for employees, contractors, in order to protect themselves against unjustifiably expansive interpretations of the Act such as in the instant case, must increase their bids by the amount of premiums for Longshoremen's coverage. The cost for this insurance coverage far exceeds that for workers' compensation coverage which is required by any state. For example, the rates for LHWCA coverage were 252 percent higher than workers' compensation rates for a project bid in the State of California (see Appendix E-9). When it is taken into consideration that workers' compensation premiums account for approximately 5 percent of a contractor's bid, the cost for this project in

California, for example, has been found to increase by approximately 7 percent. *Id.* In the State of Florida, rates for LHWCA coverage are 160 percent higher than the rates for state compensation. *id.*

The premium rates reflect the benefit levels which the employer must pay to his employee. Under the LHWCA, benefit payments are significantly higher than those established by state compensation laws. For example, in 1980, the maximum compensation rate under the LHWCA was $456.24. In Connecticut, the maximum state benefit rate was $285.00; in Louisiana, $163.00; in Georgia, $110.00; in Mississippi, $98.00 (see Appendix B). Moreover, LHWCA benefits have increased far more rapidly than related economic indices. Between 1972 and 1980, LHWCA benefits increased 551 percent, while the national average weekly wage increased only 73 percent, and the consumer price index increased only 97 percent (see Appendix C). As of January, 1981, the maximum weekly benefit under the LHWCA ($456.24—temporary, total disability, single individual) represented 169 percent of the average wage of the average covered employee and 200 percent of the national average weekly wage (see Appendix D).

C. Personnel problems resulting from the extention of LHWCA benefits to construction workers

As discussed *supra*, p. 7, this Court recognized in *Ford* that Congress intended to apply a uniform standard of coverage for similarly situated employees. On a highway construction project which includes a bridge over navigable waters, it would not be unusual for some employees to be pouring concrete on the roadway approach to the bridge at the same time other construction workers are pouring concrete on the bridge itself. Clearly the Fourth Circuit's decision, which would extend LHWCA coverage to the latter employees but not to the former, is both irrational and a frustration of Congressional intent. Moreover, such an irrational classification is bound to result in serious personnel problems and a likely increase in litigation for contractors who will have to attempt to explain to employees and/or their union representatives why two seemingly identically situ-

ated employees, who receive identical injuries, will nevertheless receive totally disparate benefits.

D. Availability of coverage

Conflict among the circuits and the unjustified expansion of what constitutes maritime employment, as illustrated by the case at bar, not only create confusion among contractors but also adversely affect contractors' ability to obtain appropriate insurance coverage of their potential LHWCA obligations. Many commercial insurers will not insure potential LHWCA exposures in the construction industry because, in their view, the open ended benefits provided by the Act make it virtually impossible for underwriters to determine future costs and, therefore, determine the proper price for coverage. In essence, it has been the experience of AGC's membership nationwide that, under these circumstances, LHWCA coverage is either unratable or provided only with large—and expensive—premium cushions (see Appendix E-11-12).

In sum, and aside from its legal deficiencies, the Fourth Circuit decision threatens to have a major adverse impact upon the construction industry by further obfuscating the scope of coverage under the LHWCA as it applies to construction workers who traditionally have been covered under state workmen's compensation laws. The resulting confusion, coupled with the high cost and limited availability of LHWCA insurance coverage, is likely to cause contractors on some projects to needlessly overbid and lose work while contractors in other cases may omit such coverage and incur a serious financial loss as a result of unwarranted judicial expansion of the Act over construction workers. These and the related practical problems discussed above make it imperative that this Court grant certiorari in this case in order to clarify the parameters of LHWCA coverage in the construction industry.

CONCLUSION

For the foregoing reasons, Petitioner's writ of certiorari should be granted.

Respectfully submitted,

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LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972

HEARINGS
BEFORE THE

SUBCOMMITTEE ON LABOR
OF THE
COMMITTEE ON
LABOR AND PUBLIC WELFARE

UNITED STATES SENATE
NINETY-SECOND CONGRESS
SECOND SESSION
ON
S.2318

TO AMEND THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AND FOR OTHER PURPOSES

S. 525

TO AMEND THE LONGSHOREMEN'S AND HARBOP WORKERS' COMPENSATION ACT TO IMPROVE ITS BENEFITS, AND FOR OTHER PURPOSES

S.1547
RELATING TO COMPENSATION IN THE CASE OF DISABILITY OR DEATH OF MARINE PETROLEUM WORKERS

MAY 2 ,10, 17, 24 and JUNE 5, 1972

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EUGENE MITTELMAN, Minority Labor Counsel

C O N T E N T S

Text of: Page

S.2318 - - - - - - - - - - - - 3
S. 525 - - - - - - - - - - - - 13
S.1547 - - - - - - - - - - - - 24

CHRONOLOGICAL LIST OF WITNESSES

Tuesday, May 2, 1972

Hodgson, Hon. James D., Secretary of Labor, accompanied by Frederick L. Webber, Assistant to the Secretary for Legislation; Richard Grunewald, Assistant Secretary for Employment Standards; Richard Schubert, Solicitor to the Department of Labor, and Professional Staff Members 28

Wednesday, May 10, 1972

O'Donnell, Capt. John J., president, the Airline Pilots Association, accompanied by Woodie Osborn, counsel; and Norman Weintraub, director of research 53

McGuigan, Howard, legislative representative, and James O'Brien, assistant director, Social Security Department, AFL-CIO; and George Apperson, Greater Washington Central Labor Council, AFL-CIO 60

Tobin, Patrick, Washington representative, International Longshoremen's & Warehousemen's Union, accompanied by Julius Stern, former welfare officer,

Local 10, ILWU; Everett Ede, former president, Local 8, ILWU; and Joseph Leonard, safety director, ILA ----- 130
Koonz, Joseph Jr., Esq., Ashcraft & Gerel, Washington,DC, accompanied by James A. Mannio 164

Wednesday, May 17, 1972

Hartman, Ralph, assistant manager, Safety and Workmen's Compensation Division, Industrial Relations Department, Bethlehem Steel Corp.; accompanied by Edward Hood, representing the Shipbuilders Council of America ------- 169
Maisonpierre, Andre, vice president, American Mutual Insurance Alliance ---------- 221
Hourihan, James A., Metropolitan Washington Board of Trade--- 248

Wednesday, May 24, 1972

Scanlan, Francis A., member, firm of Kelley, Deasey & Scanlan, Philadelphia, Pa. ------- 258
Vickery, Edward D., attorney at law, Houston, Tex., on behalf of the National Maritime Compensation Committee ------- 293
Kaplan, David B., chairman, Admiralty Section, American Trial Lawyers Association- ------ 351
Shelton, Joseph, representing the International Association of Drilling Contractors ------ 393
Richardson, E. Leland, representing the International Association of Drilling Contractors ---- 511

Wed., May 17, 1972 (continued)

Moody, William, representing the Maritime Trades Department, AFL-CIO - - - - - - - - - - - - - 574
Martzell, John R., representing the Louisiana Trial Lawyers Association - - - - - - - - - - - 591

Monday, June 5, 1972

Burton, Hon. Phillip, Member of Congress, Fifth District, California - - - - - - - - - - - 617
Lindsey, Dennis, National Maritime Compensation Committee - - 619
Anthony, Capt. John H., president, Metropolitan Stevedore Co. - - - - - - - - - - - - - - - 620
Smith, Fred R., chairman of the board, Seattle Stevedore Co., & Southeast Stevedoring Corp.- - 626
Pierce, Emmet J., vice president, Marine Terminals Corp. - - - - - 632
Eschen, Chester, Jr., president, California Stevedore & Ballast Co., - - - - - - - - - - - - - 640
Benfield, Robert P., vice president, Bayly, Martin & Fay, Inc., insurance brokers - - - - - - - - 656
Grossetti, Mario, international representative, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers - - - - - - - - 663
Huddleston, C.W., assistant business manager, Lodge No. 10, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, Oakland, Calif. - - - - - - - - - 663

Monday, June 5, 1982 (continued)

Gladstein, Richard, representing the International Longshoremen's & Warehousemen's Union - - - - 664
Stern, Julius, representing the International Longshoremen's & Warehousemen's Union - - - - - 669
Lupher, Tom, representing the International Longshoremen's & Warehousemen's Union - - - - - 673
Ede, Everett D., representing the International Longshoremen's & Warehousemen's Union - - - - - 675

STATEMENTS

Anthony, Capt. John H., president, Metropolitan Stevedore Co. - - 620
Benfield, Robert P., vice president, Bayly, Martin & Fay, Inc., insurance brokers - - - - - - 656
Burton, Hon. Phillip, Member of Congress, Fifth District, California - - - - - - - - - 617
Ede, Everett D., representing the International Longshoremen's & Warehousemen's Union - - - - - 675
Eschen, Chester, Jr., president, California Stevedore & Ballast Co. - - - - - - - - - - - - - 640
Flynn, James A., Esq., on behalf of the New York Shipping Association, Inc., and the National Maritime Compensation Committee (with attachments) - - - - - - - 722
Gladstein, Richard, representing the International Longshoremen's & Warehousemen's Union - - - - - 664

Statements (continued)

Gleason, Thomas W., president, International Longshoremen's Association, AFL-CIO, New York, N.Y., May 10, 1972, before the Labor Subcommittee of the Senate Committee on Labor and Public Welfare, on S.2318 and S.525 - - - - - - - - - - - - 154
Grossetti, Mario, international representative, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers - - - - - - - 663
Hartman, Ralph, assistant manager, Safety and Workmen's Compensation Division, Industrial Relations Department, Bethlehem Steel Corp; accompanied by Edward Hood, representing the Shipbuilders Council of America 169
Prepared statement 178
Statement on S.525 by Mr. Hartman 212
Statement on S.2318 by Mr. Hartman 194
Hodgson, Hon, James D., Secretary of Labor; accompanied by Frederick L. Webber, Assistant to the Secretary for Legislation; Richard Grunewald, Assistant Secretary for Employment Standards; Richard Schubert, Solicitor to the Department of Labor, and professional staff members - - - - - - - - - - - - 28
Hourihan, James A., Metropolitan Washington Board of Trade- - - 248

Huddleston, C.W., assistant business manager, lodge No. 10, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Oakland, Calif. - - - - - - - - - 663
Johnstad, Errol L., president, Flight Engineers' International Association, AFL-CIO, May 10, 1972 - - - - - - - - - - - - - - - 702
Kaplan, David B., chairman, Admiralty Section, American Trial Lawyers Association - - - - - - 351
Prepared statement 358
Koonz, Joseph, Jr., Esq., Ashcraft & Gerel, Washington, D.C., accompanied by James A. Mannino - - - 164
Prepared statement 166
Lindsey, Dennis, National Maritime Compensation Committee - - - - 619
Lupher, Tom, representing the International Longshoremen's & Warehousemen's Union - - - - - 673
Maisonpierre, Andre, vice president, American Mutual Insurance Alliance - - - - - - - - 221
Prepared statement 228
Martzell, John R., representing the Louisiana Trial Lawyers Association - - - - - - - - - - - - - 591
McGuigan, Howard, legislative representative, and James O'Brien assistant director, Social Security Department, AFL-CIO; and George Apperson, Greater Washington Central Labor Council, AFL-CIO - - - - - - - - - - - - - - - - - 60
Prepared statement 75

Moody, William, representing the Maritime Trades Department, AFL-CIO - - - - - - - - - - - - - 574
Prepared statement 581
O'Donnell, Capt. John J., president, the Airline Pilots Association, accompanied by Woodie Osborn, counsel; and Norman Weintraub, director of research 53
Pierce, Emmet J., vice president, Marine Terminals Corp. - - - - - 632
Richardson, E. Leland, representing the International Association of Drilling Contractors - - - - - 511
Prepared statement 518
Scanlan, Francis A., member, firm of Kelley, Deasey & Scanlan, Philadelphia, Pa. - - - - - - - 258
Prepared statement 275
Shelton, Joseph, representing the International Association of Drilling Contractors - - - - - - 393
Prepared statement 404
Smith, Fred R., chairman of the board, Seattle Stevedore Co., and Southeast Stevedoring Corp. 626
Stern, Julius, representing the International Longshoremen's & Warehousemen's Union - - - - - 669
Prepared statement 672
Texas Mid-Continent Oil & Gas Association on S.1547, May 19, 1972 - - - - - - - - - - - - - 716
Tobin, Patrick, Washington representative, International Longshoremen's & Warehousemen's Union, accompanied by Julius Stern, former welfare officer, Local 10, ILWU; Everett Ede, former president, Local 8, ILWU;

and Joseph Leonard, safety director, ILA - - - - - - - - - - 130
Tower, Hon, John, a U.S. Senator from the State of Texas - - - - 256
Vickery, Edward D., attorney-at-law, Houston, Tex., on behalf of the National Maritime Compensation Committee - - - - - - - 293
Prepared statement 314

ADDITIONAL INFORMATION

Articles, Publications, etc.:

A bill--the compensation in the case of disability or death of air carrier flight crew member--submitted by Capt. John J. O'Donnell - - - - - - - - - - - - - 58
A Compilation of Third Party Case Figures Filed in the Southern District of Texas - - - - - - - - - 307
A partial list of multiple third-party claims against California Stevedore & Ballast Co., selected at random - - - - - - - - - - - - 645
An Act To Assure Safe and Healthful Working Conditions for Working Men and Women - - - - - - - - 95
"An Analysis of Senate Bill 525," prepared by David B. Kaplan, Chairman of Admiralty Section, American Trial Lawyers Association - - - - - - - - - - - - - 362
Analysis of Rig and Personnel Survey conducted by the American Association of Oilwell Drilling Contractors Marine Petroleum Workers' Act Committee - - - - - 493
"Analysis of S.1547," by John R. Martzell - - - - - - - - - - - - - 602

Articles, Publications, etc. (cont'd)

"Analysis of Workmen's Compensation Laws," by the Chamber of Commerce of the United States, Washington, D.C., 1972 - - - - - 40
California Stevedore & Ballast Co., prayers on third-party cases - - - - - - - - - - - - - - - 644
Jones Act committee report on investigative phase - - - - - - - 447
Marine Terminal Corp., SanFrancisco, Calif.; some of the third-party suits presented over the years 1969-71 - - - - - - - - 635
Oliver, Harry, declaration of - - 647
Appendix.--Retroactive period in State Workmen's Compensation Laws, January 1, 1972 - - - - - 97
Review by David B. Kaplan, Chairman of Admiralty Section, American Trial Lawyers Association, of S.2318 - - - - - - - - - 358
Shipbuilders Council of America, regular members - - - - - - - - - 169
Statement of policy on longshore compensation by the International Longshoremen's and Warehousemen's Union, 19th Biennial Convention, Honolulu, Hawaii, April 19-23, 1971 - - - - - - - - - - - - - - - 135
"Stevedoring Companies Advise Labor Department Safety Proves Profitable," from the U.S.Department of Labor, Office of Information's newsletter, December 16, 1970 - - - - - - - - - - - - - - - 805
"The New Adventurers," by the Standard Oil Co. (New Jersey) - - 830

Articles, Publications, etc. (cont'd)

"What Is the Workmen's Compensation Insurance Pricing System All About?" presented by Robert D. Heitzmann, assistant general manager, National Council on Compensation Insurance, September 10, 1971 - - - - - - - - - - 806

Workmen's Compensation--Resolution No. 131, policy resolution on, American Federation of Labor and Congress of Industrial Organizations, adopted November 1971 - 93

Communications to:

Eagleton, Hon. Thomas F., a U.S. Senator from the State of Missouri, from:

Hood, Edwin M., president, Shipbuilders Council of America, Washington, D.C., June 7, 1972 - - - - - - - 820

Scanlan, Francis A., counselor at law, Kelley, Deasey & Scanlan, Philadelphia, Pa., May 30, 1972 - - - - - - - 838

Watt, Graham W., deputy mayor-commissioner, the District of Columbia, May 4, 1972 - 752

Elisberg, Donald, associate counsel, Senate Labor Committee, from:

Doyle, Herbert A., Jr., Acting Director, Office of Workmen's Compensation Programs, U.S. Department of Labor, Washington, D.C., November 15, 1971, (with enclosure) - - - - - - 761

Ekeberg, John M., Director,

Communications to (continued)

Bureau of Employees' Compensation, Wage and Labor Standards Administration, U.S. Department of Labor, Washington, D.C., Aug. 27, 1971 (with enclosure) - - 757
Flockhart, Robert W., secretary, National Council on Compensation Insurance, New York, N.Y., May 9,1972 823
Heitzmann, Robert D., assistant general manager, National Council on Compensation Insurance, New York, N.Y., Apr. 25, 1972 - - - 825
Kallop, Roy H., actuary, National Council on Compensation Insurance, New York, N.Y., May 4, 1972 - - - 822
June 30, 1972- - - - - - 824
Lieber, Gary, legislative aide to Senator John Tower, Washington, D.C., June 2, 1972 (with enclosure) - - - 715
Lindsay, Dennis, attorney, Lindsay, Nahstoll, Hart, Duncan, Dafoe & Krause, Portland, Oreg., June 15, 1972 (with enclosure) 783
McCafferty, James A., assistant chief, Division of Information Systems, Administrative Office of the U.S. Courts, Washington, D.C., April 28, 1972 with enclosure
Organ, Donald V., attorney, Organ & Pierce, New Orleans,

Communications to (continued)

La., May 18, 1972 - - - 816
Richardson, E. Leland, attorney, Dale, Owen, Richardson, Taylor & Matthews, Baton Rouge, La., June 30, 1972 (with enclosure)- - 559
Scanlan, Francis A., Kelly, Deasey & Scanlan, Philadelphia, Pa., July 17,1972

Stocker, John E., Acting Deputy Director, Office of Workmen's Compensation Programs, U.S. Department of Labor, Washington, D.C., April 14, 1972 (with enclosures) - - - - - - - 765
Vickery, E.D., attorney, Royston, Rayzor, Cook & Vickery, Houston, Tex., June 30, 1972, with enclosure - - - - - - - - - - - -
Wilcox, Thomas D., executive secretary and counsel, Great Lakes Terminals Association, Washington, D.C., April 19, 1972 - - - - - 841

Robertson, D.B., Metropolitan Stevedore Co., Wilmington, Calif., from Sikes, Pinney & Matthew, attorneys at law, North Hollywood, Calif., May 31, 1972 - - - - - - - - - - - - - - - 795

Senate Subcommittee on Labor, Washington, D.C., from Mrs. Wenonah Drasnin, corresponding secretary, Federated Auxiliary No. 17, International Longshoremen's & Warehousemen's Union,

Communications to (continued)

Oakland, Calif., May 17, 1972 840

Tobin, Patrick, Washington representative, International Longshoremen's & Warehousemen's Union, Washington, D.C., from Richard Gladstein and Norman Leonard, of the Law Offices of Gladstein, Andersen, Leonard, Sibbett & Patsey, SanFrancisco, Calif., May 2, 1972 (with attachments) - - - - - 137

Williams, Hon. Harrison A., a U.S. Senator from the State of New Jersey, chairman, Committee on Labor and Public Welfare, from:

Bonadio, Frank, president, Building and Construction Trades Department, AFL-CIO, Washington, D.C., June 5, 1972 (with enclosure) - - - 678

Carr, Braxton B., president, The American Waterways Operators, Inc., Washington, D.C., June 2, 1972 - - - - - - - 719

Fitzsimmons, Frank E., general president, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Washington, D.C., May 23, 1972 700

Harman, Thomas E., associate counsel, American Insurance Association, Washington, D.C., June 6, 1972 - - - - - - - 713

Hodgson, Hon. J.D., Secretary of Labor, U.S. Department of Labor, Washington, D.C., May 5, 1972 - - - - - - - 751

Communications to(continued)

Lyons, John H., general president, International Association of Bridge, Structural, and Ornamental Iron Workers, AFL-CIO, St. Louis, Mo., June 26, 1972 (with enclosure) - - - - - - - - - - - 695
McGuigan, F. Howard, legislative representative, American Federation of Labor and Congress of Industrial Organizations, Washington, D.C., June 9, 1972 (with enclosure) 797
Rommel, Wilfred H., Assistant Director of Legislative Reference, Office of Management and Budget, Washington, D.C., May 15, 1972 - - - - - - - 749
Tipton, S.G., Air Transport Association, Washington, D.C., June 16, 1972 - - - - - - - 707
Watt, Graham W., Assistant to the Commissioner, the District of Columbia, July 20, 1971 - 753
May 2, 1972 - - - - - - - 755

Selected tables:

Approximate maximum weekly benefit if the $70 maximum benefit had increased by the same proportion as estimated longshore average weekly wages - - - - - 38
California rates (onshore) effective April 1, 1972 - - - - - 660
Comparison of workmen's compensation benefits, Maryland, Virginia, and the District of Columbia, May 15, 1972 - - - - 252

Selected tables (continued)

"Monthly Report on Hours and Earnings for the District of Columbia, February 1972," from the Department of Labor, March 30, 1972 - - - - - - - - 68
Table 1.--Injuries reported under the Longshoremen's and Harbor Worker's Compensation Act, and extensions thereof, July 1, 1970, to June 30, 1971, by district - - - - - - - - - - - - 296
Table 2.--Injuries reported under the Longshoremen's and Harbor Worker's Compensation Act, and extensions thereof, July 1, 1970, to June 30, 1971, by district and act - - - - - - 298

MAXIMUM COMPENSATION RATES
SELECTED MARITIME STATES vs. LHWCA
BY YEAR SINCE 1971

DATA AS OF JANUARY 1 OF SUCCEEDING YEAR

SOURCE: U.S. CHAMBERS OF COMMERCE
ANALYSIS OF WORKERS'
COMPENSATION LAWS

YEAR	ALABAMA	CALIFORNIA	CONNECTICUT	FLORIDA	GEORGIA	LOUISIANA	MAINE	MASS.	MISS.	N.J.	N.Y.	TEXAS	VIRGINIA	LHWCA
1971	$ 55.00	$ 70.00	$ 95.00	$ 56.00	$ 50.00	$ 49.00	$ 78.00	$77.00	$ 40.00	$101.00	$80.00	$49.00	$ 62.00	$ 70.00
1972	60.00	70.00	153.00	66.00	50.00	49.00	81.42	80.00	56.00	108.00	80.00	49.00	70.00	167.00
1973	68.00	119.00	168.00	80.00	65.00	65.00	83.00	90.00	56.00	108.00	80.00	63.00	80.00	210.54
1974	75.00	119.00	178.00	98.00	80.00	65.00	131.29	95.00	63.00	119.00	95.00	70.00	91.00	261.00
1975	102.00	119.00	189.00	112.00	95.00	85.00	141.41	95.00	63.00	128.00	95.00	70.00	149.00	318.38
1976	110.00	154.00	202.50	119.00	95.00	95.00	151.84	140.00	84.00	138.00	95.00	77.00	162.00	342.54
1977	120.00	154.00	220.50	126.00	95.00	130.00	220.88	150.00	91.00	146.00	125.00	91.00	175.00	367.22
1978	128.00	154.00	306.00	130.00	110.00	140.00	231.72	211.37	91.00	156.00	215.00	105.00	187.00	396.78
1979	136.00	154.00	261.00	211.00	110.00	149.00	306.23	227.21	98.00	185.00	215.00	119.00	199.00	426.26
1980	148.00	175.00	285.00*	228.00	110.00	163.00	322.17	245.48	98.00	199.00	215.00	133.00	213.00	456.24

(*to $427.50 in specified cases)

MAXIMUM COMPENSATION RATES
ALABAMA VS LHWCA
BY YEAR SINCE 1971

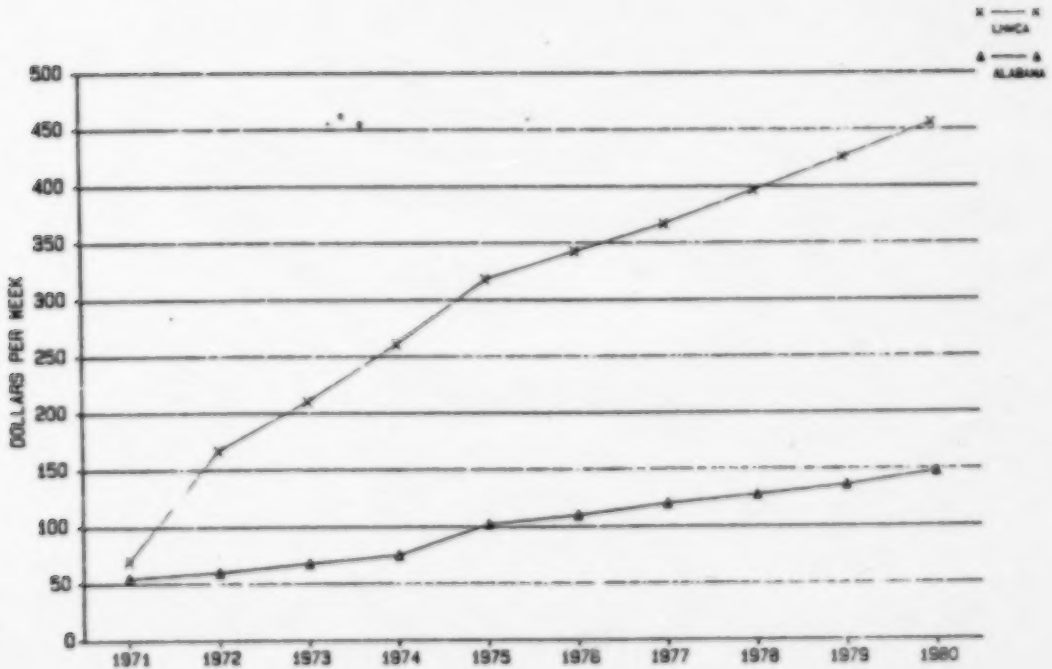


EXHIBIT A
Page 2

MAXIMUM COMPENSATION RATES
CALIFORNIA VS LHWCA
BY YEAR SINCE 1971

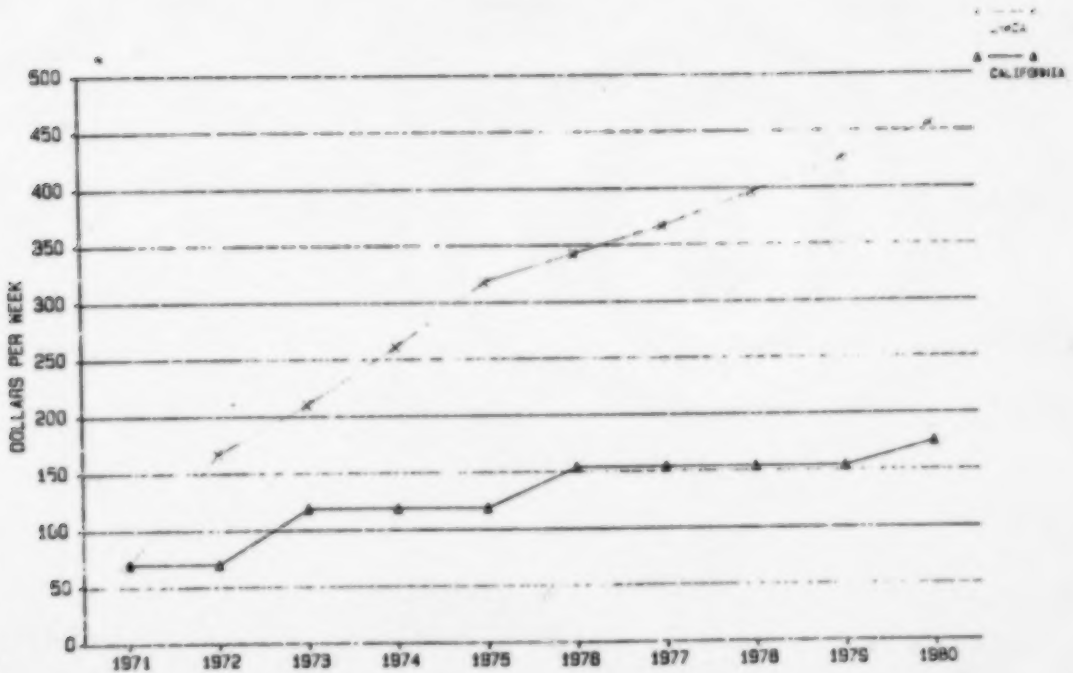


EXHIBIT A
Page 1

MAXIMUM COMPENSATION RATES
CONNECTICUT VS LHWCA
BY YEAR SINCE 1971

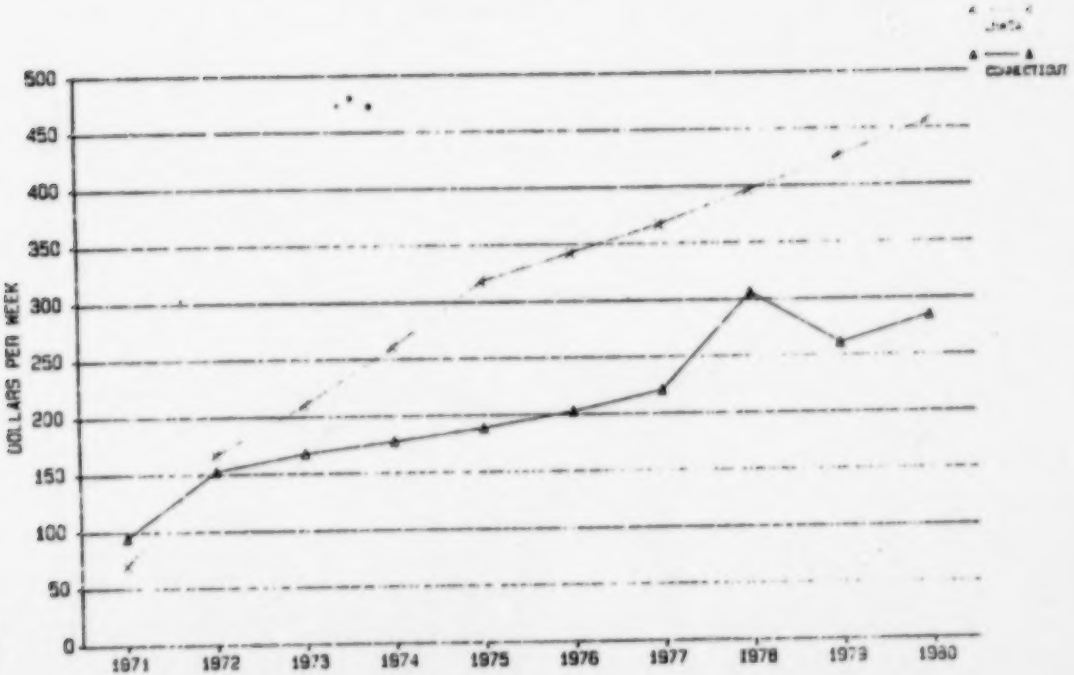


EXHIBIT A
Page 4

MAXIMUM COMPENSATION RATES
FLORIDA VS LHWCA
BY YEAR SINCE 1971

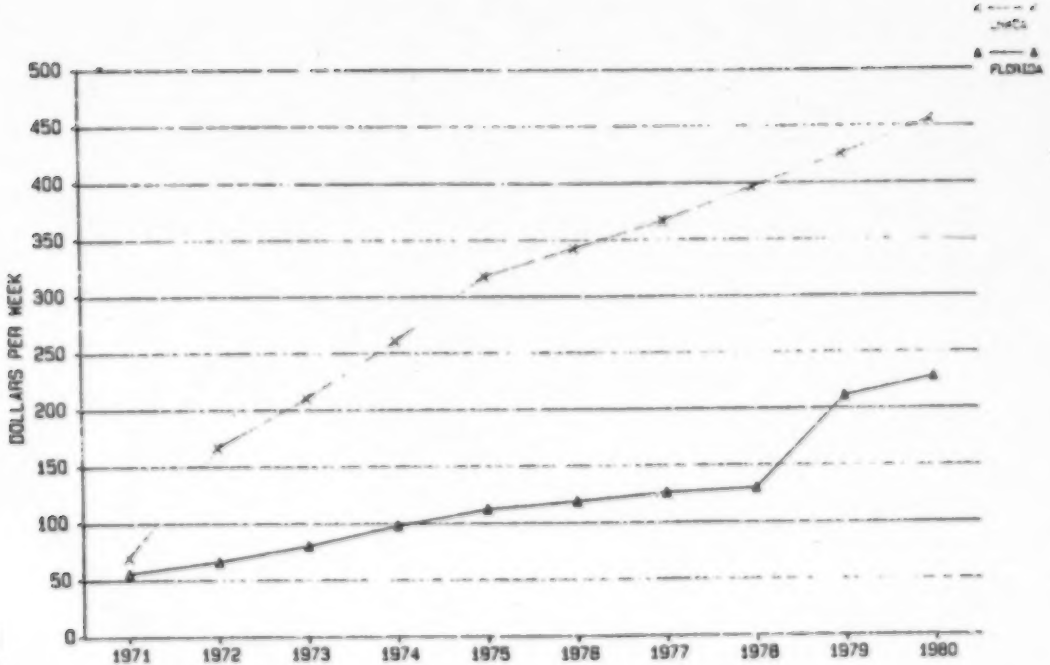


EXHIBIT A
Page 5

MAXIMUM COMPENSATION RATES
GEORGIA VS LHWCA
BY YEAR SINCE 1971

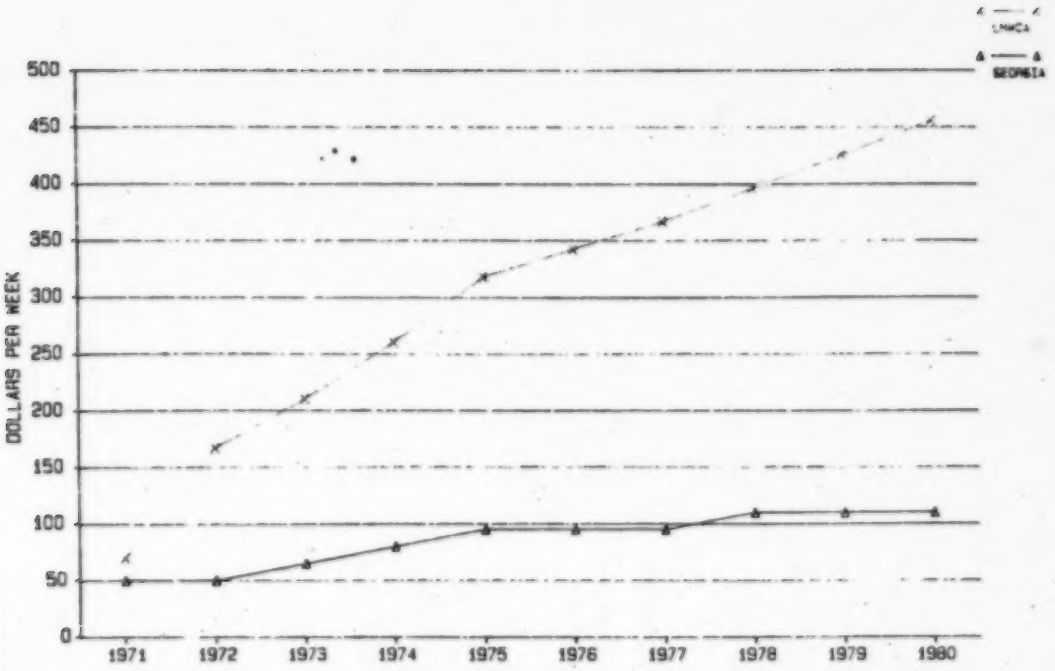


EXHIBIT A
page 6

MAXIMUM COMPENSATION RATES
LOUISIANA VS LHWCA
BY YEAR SINCE 1971

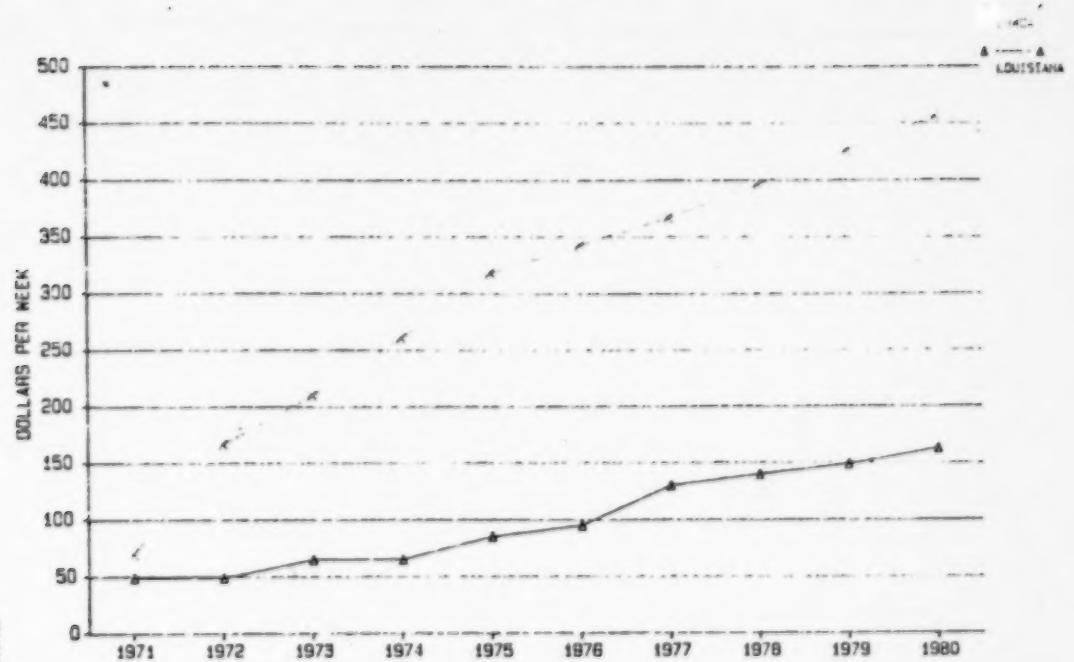


EXHIBIT A
Page 7

MAXIMUM COMPENSATION RATES
MASACHUSETTS VS LHWCA
BY YEAR SINCE 1971

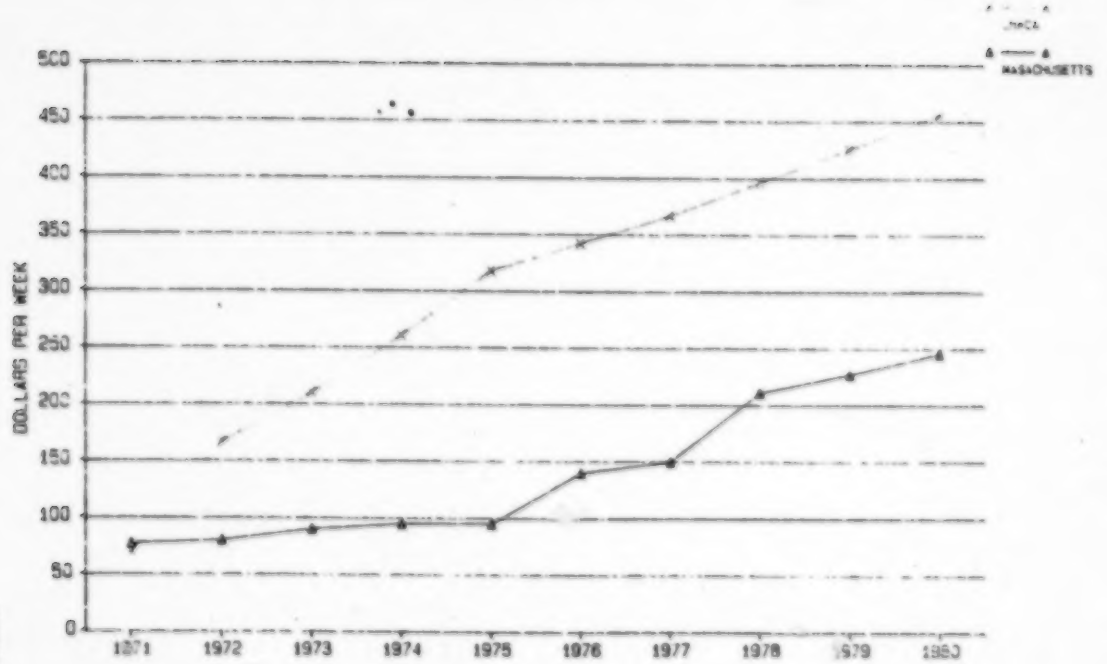


EXHIBIT A
Page 8

MAXIMUM COMPENSATION RATES
MISSISSIPPI VS LHWCA
BY YEAR SINCE 1971

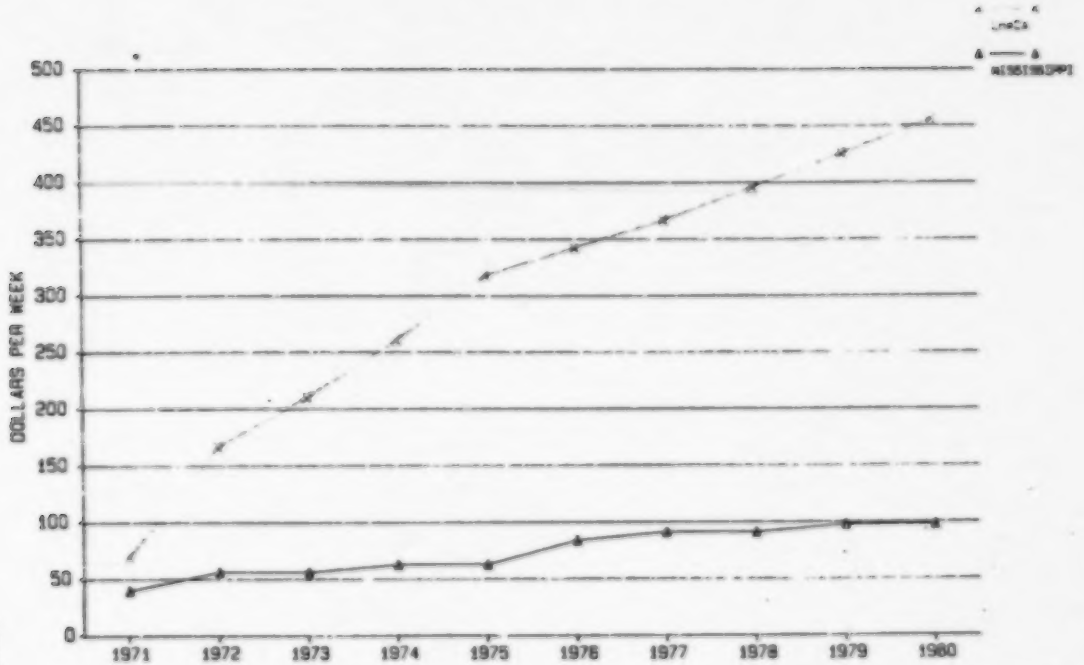


EXHIBIT A
Page 9

MAXIMUM COMPENSATION RATES
NEW JERSEY VS LHWCA
BY YEAR SINCE 1971

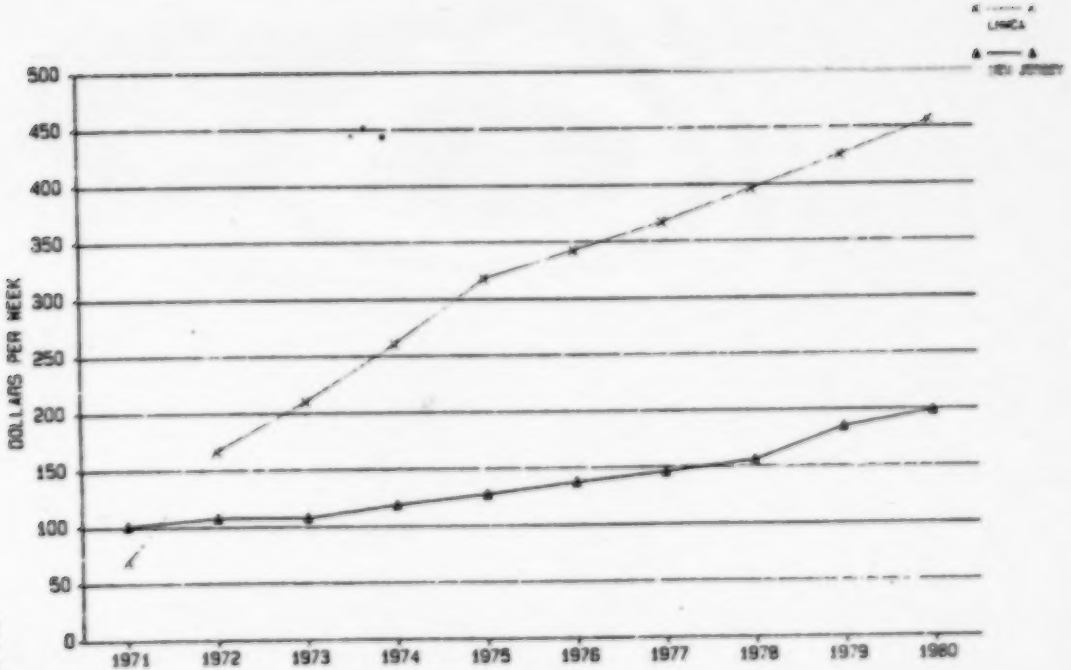


EXHIBIT A
page 10

MAXIMUM COMPENSATION RATES
NEW YORK VS LHWCA
BY YEAR SINCE 1971

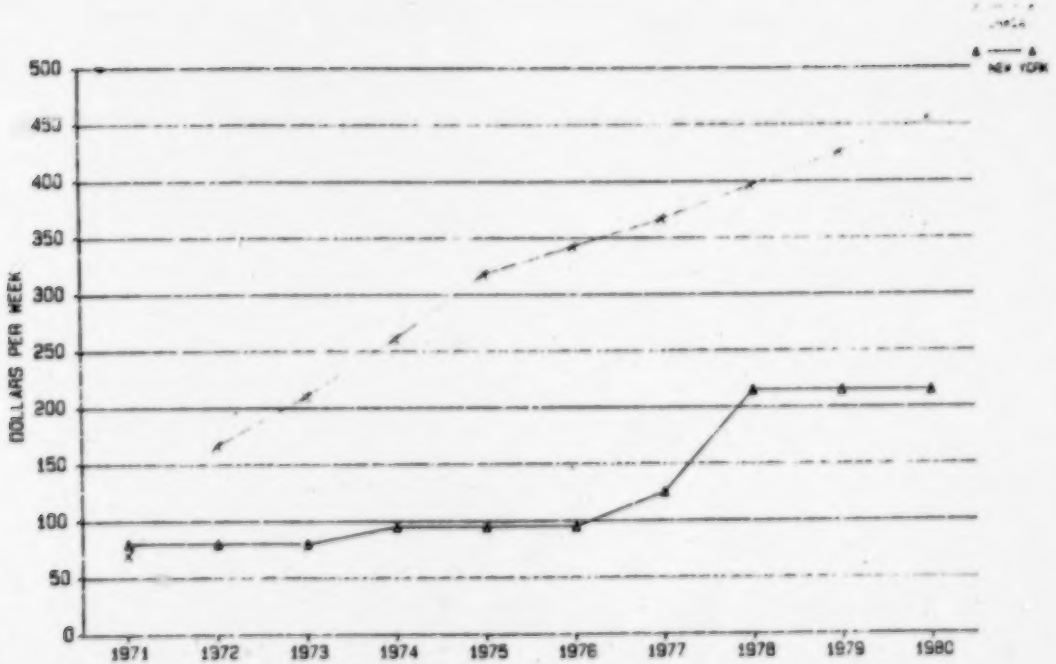
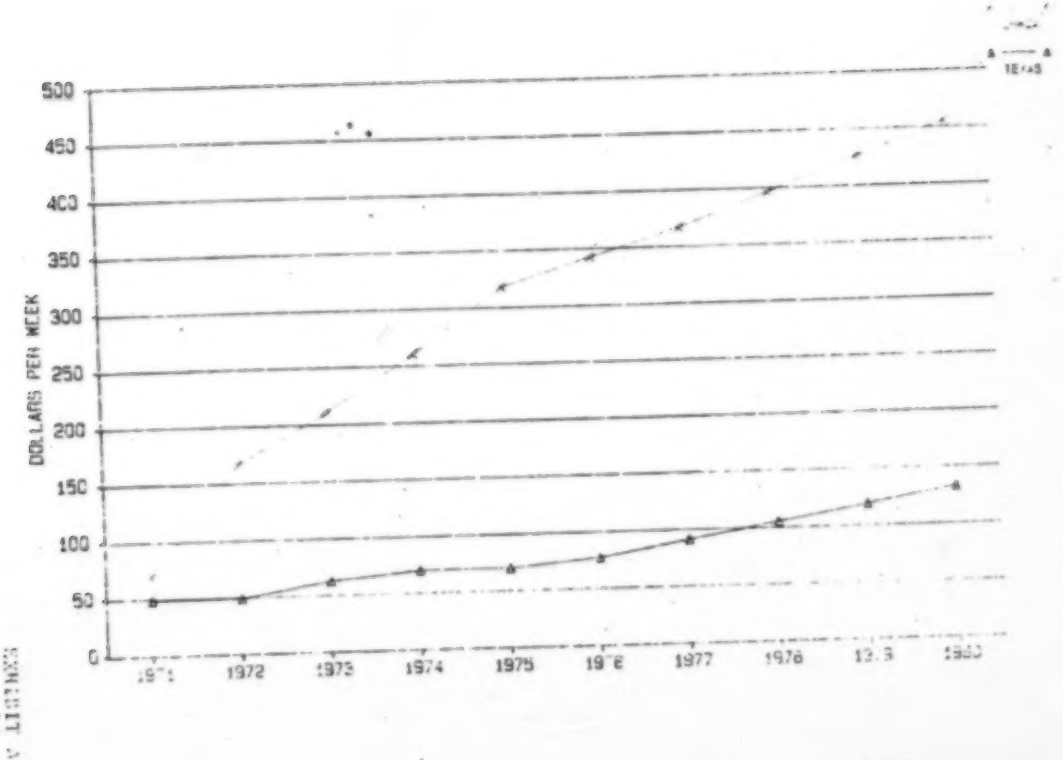


EXHIBIT A
Page 11

MAXIMUM COMPENSATION RATES
TEXAS VS LHWCA
BY YEAR SINCE 1971



MAXIMUM COMPENSATION RATES
VIRGINIA VS LHWCA
BY YEAR SINCE 1971

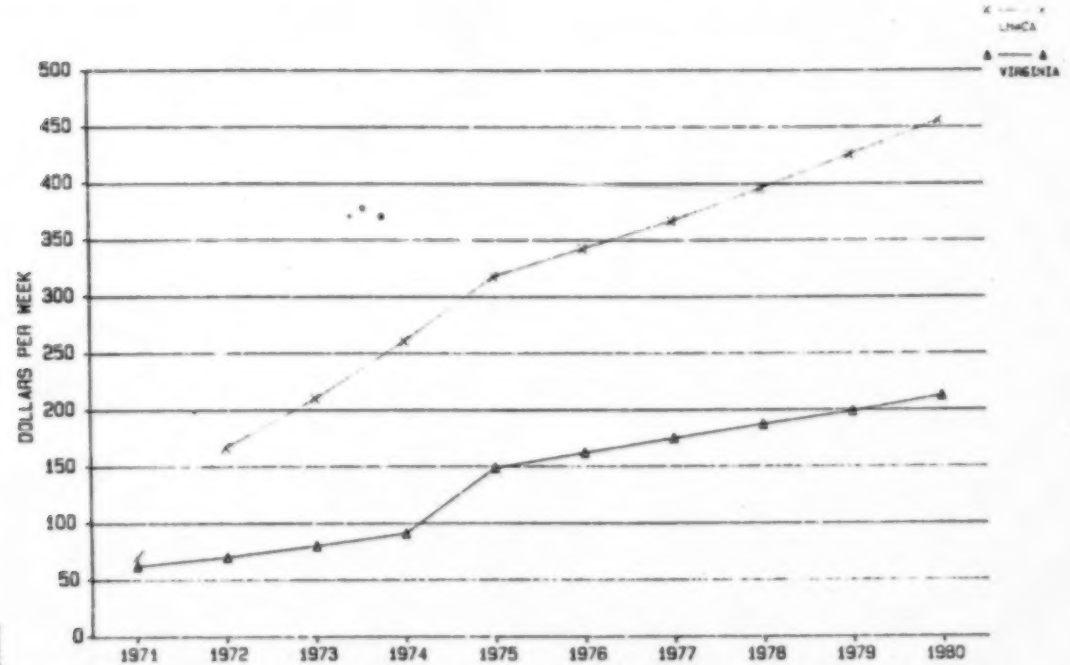
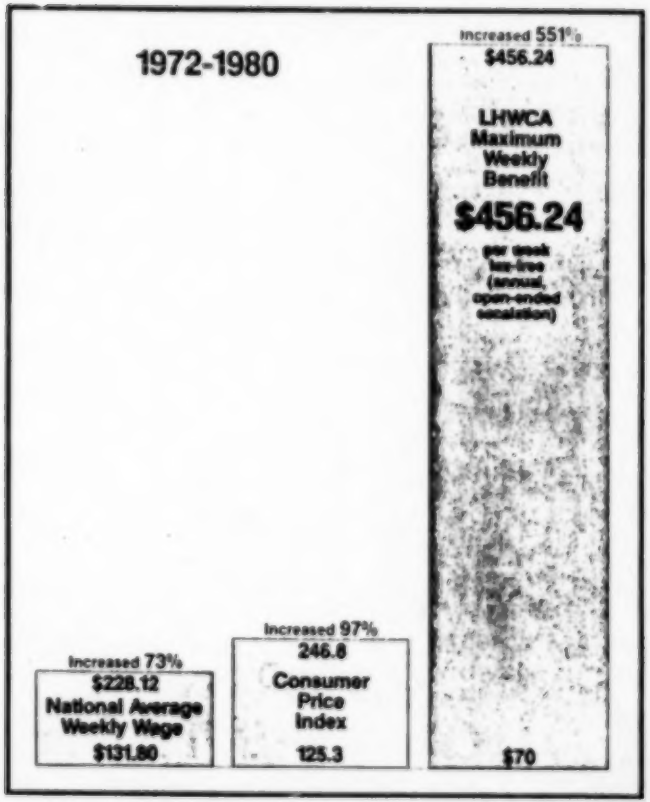


EXHIBIT A
Page 13

LHWCA Benefit Increases have far outpaced the growth of related economic indices



MAXIMUM WEEKLY BENEFIT

TEMPORARY TOTAL DISABILITY -- SINGLE INDIVIDUAL

States Represented on Senate Labor Committee

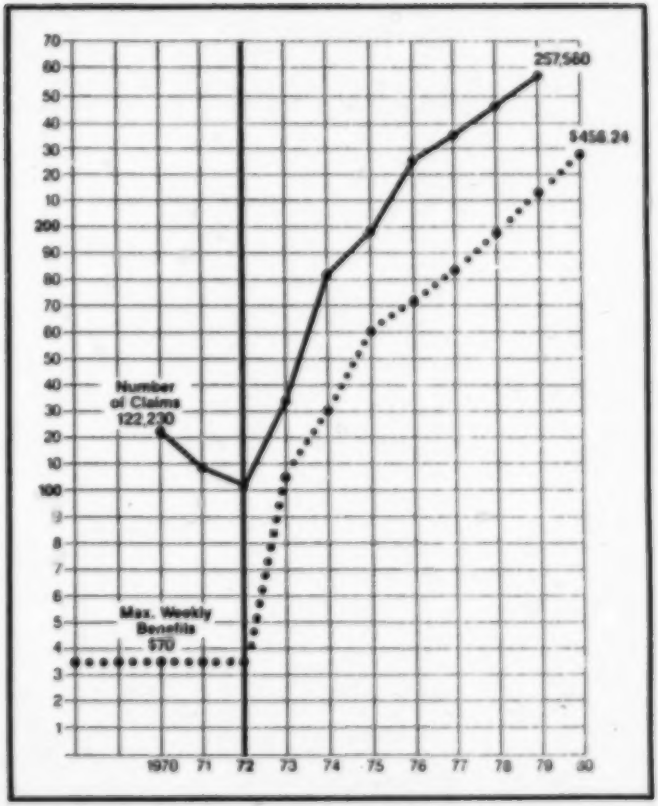
January 1, 1981

State	Benefit Amount	Maximum Relative to Average Wage of Covered Employee
LONGSHORE ACT	$456.24	169% (200% of national average weekly wage)
ALABAMA	148	66-2/3%
CONNECTICUT	285	100%
FLORIDA	228	100%
INDIANA	140	69% (no escalator)
MASSACHUSETTS	245.48	100%
MICHIGAN	181	90% (effective 1/1/82)
MISSOURI	150	66-2/3% (effective 8/13/81)
NEW HAMPSHIRE	213	100%
NEW JERSEY	199	75%
NORTH CAROLINA	210	100%
OHIO	275	100%
OKLAHOMA	155	66-2/3%
RHODE ISLAND	217	100%
UTAH	230	100%
VERMONT	208	100%
WEST VIRGINIA	262.08	100%
NATIONAL AVERAGE	228.32	90%

Prepared by Eric J. Oxfeld, Employee Benefits Attorney, Chamber of Commerce of USA
Telephone (202) 659-6083

Increase in Claims and Benefit Levels since 1972 Amendments to the Longshore Act

Since 1972, number of employees covered increased from 700-800,000 to 905,000



Source U.S. Dept of Labor Congressional Hearings

Testimony of
The Associated General
Contractors of America

Presented to the

Subcommittee on Labor of the

Committee on Labor and Human Resources

United States Senate

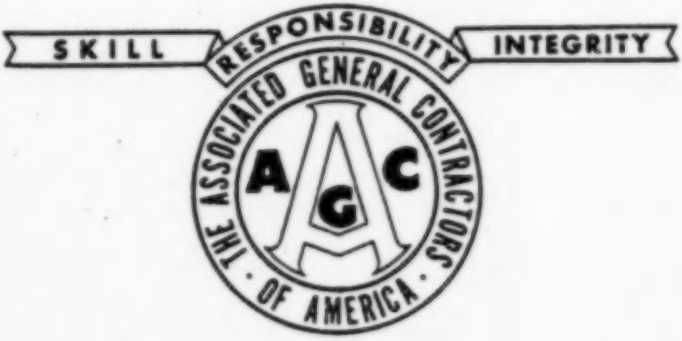
June 17, 1981

On the Topic of

Amendment of the U.S.
Longshoremen and Harbor
Workers Compensation Act

Presented by

Robert J. Massman



My name is Robert Massman, and I am a construction contractor from Kansas City, Missouri. I am here today representing the Associated General Contractors of America, a trade association representing 8,400 general contractors.

General contractors, particularly those involved in the construction of facilities on or over navigable water, have been aware of the United States Longshoremen's and Harbor Workers' Act for some time. It was not until recently, however, that the Longshoremen's Act became an ever-increasing problem not only for construction contractors who work on or over navigable water but also for contractors who work near water.

Jurisdiction Matters

Claims for Longshoremen's Act benefits by employees of contractors who operate on, over, or near water have increased greatly since the 1972 amend-

ments, as has the scope of exposure as to what sites are, or what sites could be, construed to be included under the Act. In most situations, the contractor is unaware that he is faced with a Longshoremen's Act exposure; nor, we believe, should a construction contractor have any reason to expect that his operations are subject to the Longshoremen's Act.

We suggest to this Subcommittee that the definition of maritime employment, as it appears in the Longshoremen's Act, was never intended to cover construction operations. Construction is certainly not, nor should it be construed as, maritime employment. Employees injured in the course of their employment while working for a construction contractor performing the same duties inland as they do when working near water.

Court of Appeals decisions support our position. In the Conti v. Norfolk and

Western Railway Company case, the Court found that the plaintiff's occupation was not of a traditionally maritime nature, but was that traditionally associated with railroading. More recently and more related to construction, the Second Circuit Court of Appeals made a similar decision.

Also supporting our view that construction should not and was not intended to be included under the Longshoremen's Act is the opinion by Judge Winter for the panel majority in the ITO Corporation of Baltimore v. Benefits Review Board. In this opinion, Judge Winter summarized the legislative history and background of the 1972 amendments to the Longshoremen's Act as follows:

> Section 2 and 3 of the present Act establish a dual test for coverage. the situs requirement has been retained, with the definition of "navigable waters" expanded to include certain specified land areas. In addition, a new "status" test has been added: the person injured ("employee") must have

> been engaged in "maritime employment," a concept which is nowhere defined but which includes "longshoring operations." The net effect of the 1972 Amendments was therefore to broaden the area in which an injury would be covered, and narrow the class of persons eligible to job function. Id. 1083

Clearly, construction is not a maritime or a longshoring operation, but rather the process of assembling material and building a structure.

The legislative history of the 1972 Amendments also indicates that Congress never considered, nor did it intend, tha the construction industry should fall under the purview of the Longshoremen's Act.

The logic behind the Congress' intent to expand coverage through the Amendments was to provide coverage for a worker who is not continuously engaged in Longshoring activity, but who spends some portion of his time in an employment satisfying the definition of maritime employment. However, merely because a worker is assigned

to work on or over nagivable water does not guarantee Longshoring status within the intent of the law. An employee whose primary occupation is construction work and who does not spend any portion of his time engaged in Longshoring activity should not be considered eligible for USL&H status.

Unfortunately, liberal interpretation of the Longshoremen's Act by administrative law judges, benefit review boards, and even some Appeals Courts have greatly contributed to the proliferation of claims for Longshoremen's Act benefits by injured employees of construction contractors as well as adding confusion as to whether or not an employee is covered by the Act. These bodies, through seemingly one-sided reasoning, have extended the Act to include more and more employees. This has resulted, unfortunately, in confusion, liability, and increased costs.

Confusion in bidding

At present, a construction contractor must carefully analyze each project to ascertain if Longshoremen's Act exposures are present. Unfortunately, since there is no hard, fast requirement or reason for Longshoremen's Act exposure in construction operations, due to ambiguity of the law, the contractor accepts a needless business risk in either including the expensive insurance coverage in his bid, increasing its monetary size and susceptibility to be underbid, or going without the insurance coverage and exposing his firm to large financial loss from an injured employee's claim for Longshoremen's Act benefits.

An illustration of the confusion caused by the Act is the situation where a highway contractor must bridge several streams of wading depth during the execution of a highway contract. Clearly, these streams are not capable of carrying

commercial traffic but are instead only suitable for pleasure and recreational boarting at most. The question to the contractor is whether he should add to his bid the extra price for insurance to cover the possible Longshoremen's Act exposure. As absurd as this example may seem, a contractor was actually confronted with it when his insurance agent advised him to secure coverage for these possible exposures.

Increased Cost for Longshoremen's Premiums

Construction contractors are required by state statute to provide workers' compensation for their employees. The cost for this coverage is a reflection of benefit levels established by the states and the loss experience of the contractor. Despite this coverage for employees, contractors, in order to protect themselves against liberal interpretations of the Act,

must increase their bids by the amount of premiums for Longshoremen's coverage. The cost for this insurance coverage far exceeds that for workers' compensation coverage which is required by the state. For example, the rates for USL coverage were 252 percent higher than workers' compensation rates for a project bid in the state of California. When it is taken into consideration that workers' compensation premiums account for approximately 5 percent of a contractor's bid, the cost for this project in the California example was increased by approximately 7 percent. In the state of Florida, rates for Longshoremen Act coverage are 160 percent higher than the rates for state compensation.

Even if a contractor only has minimal exposure to a possible Longshoremen's Act condition, he must carry an endorsement to his workers' compensation policy. This

endorsement can usually be obtained at no cost. However if a claim is ever made on this endorsement, Longshoremen's Act premiums are then assessed against the contractor who must, be necessity, reflect the cost of those premiums in his bids on future work.

Disparity Between State Programs & U.S. Longshoremen's Act

If the levels of compensation between state compensation rates and those of Longshoring activities remain excessively different, then the injured construction worker is thereby provided with a strong incentive not to return to work. The Congress, we are sure, did not intend to create a counterproductive compensation law that encourages malingering.

A further incentive to remain on Longshoremen's Act compensation is provided by the annual cost-of-living adjustment tied to the increase in the average

national wage.

In addition, the uncertainty as to the future rates of inflation and the 15 or 25 year payout found in many cases, makes the setting of reserves to cover potential losses a guess at best and an unnecessary risk for any businessman. The nature of the construction business is such that it cannot stand the burden of a vague and ill defined law with such disparity between its compensation levels and those provided by the various state compensation laws.

Availability of Coverage

Not only does confusion reign in determining whether or not a construction contractor has exposure created by the Act, but the contractor has great difficulty in obtaining coverage for the obligations created by Longshoremen's Act.

The reason given to us by the commercial insurers for not insuring

possible Longshoremen's Act exposures in construction is that the Act provides open-ended benefits which, we are told, make it virtually impossible for underwriters to determine future costs and, therefore, determine the proper price for coverage. In essence, that which is fixed, is unratable and hence unavailable to construction contractors.

This unavailability of insurance for possible Longshoremen's Act exposures, which was at crisis proprtions only two years ago and could occur again, has not been limited to any geographic area but is spread throughout the United States. Contractors are faced with the dilemma of broadened Longshoremen's Act exposure, mandated by liberal Department of Labor administrative law judges' and benefit review boards, and fewer insurance markets to approach to insure the expanded exposures.

In order to remedy the situations of unavailability of coverage, greatly over-expanded purview of the Longshoremen's Act, and the confusion, liability and increased costs it creates, we respectfully recommend that this Subcommittee take action to prevent any further misapplication of the Act by effectively removing construction from the definition of employers under the law.

To accomplish this risk, AGC strongly supports S. 1182 and urge that prompt action be taken on this bill.